809, the MEC provided Petitioner with a hearing to address both the summary suspension and the recommendation to terminate privileges.

The hearing Petitioner received complied completely with California law. As required by Section 809, Petitioner received notice of the proposed adverse action, of the charges that formed the basis of the adverse action, of his hearing rights, and of the time, date, and location of the hearing. The hearing was before an arbitrator who was appointed by the mutual agreement of both parties after voir dire. During the hearing, both the MEC and Petitioner were provided with the same evidence submitted to the arbitrator; were permitted to call, examine, and cross-examine witnesses; presented and rebutted evidence; and submitted written statements at the hearing's close. *See*, Cal. Bus. & Prof. Code § 809.2 (West 2004). On December 15, 1997, the arbitrator issued a detailed decision that included findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. The decision upheld 13 of the MEC's 16 charges against Petitioner, finding that the MEC sustained its burden of proof both on those charges and on the suspension and termination of Petitioner's privileges and membership.

Petitioner appealed the arbitrator's decision to a three member Appellate Review Panel ("ARP") appointed by the hospital, pursuant to California Business and Professions Code section 809.4 and the Medical Staff Bylaws. The ARP was advised by an attorney that had not previously been involved in the matter. On June 8, 1998, the ARP issued its findings and decision. It unanimously found that Petitioner received a full and fair hearing, consistent with fair process; that the MEC's recommendation and the arbitrator's decision to terminate Petitioner from the Medical Staff was reasonable and clearly warranted; that the MEC's charges and arbitrator's decision were supported by a preponderance of the

evidence; that Petitioner failed to adhere to the Respondent's policies and procedures and standards of care; and that the preponderance of the evidence supported the summary suspension and termination of Petitioner's privileges. Consistent with the arbitrator's and ARP's decisions, the Respondent's Board of Directors terminated Petitioner's Medical Staff membership and privileges.

III. STATE COURT PROCEEDINGS

After being terminated, Petitioner filed a petition for writ of administrative mandamus to the California Superior Court pursuant to California Code of Civil Procedure section 1094.5 ("Section 1094.5").[2] Under Section 1094.5, the Superior Court does not perform a *de novo* review of the proceedings, but rather, reviews the record of the hospital hearing to determine whether it complied with Section 809 and whether the record demonstrates that the hospital's action was supported by substantial evidence. Cal. Code Civ. Pro. § 1094.5(c) (West 1980 Supp. 2005). The Superior Court found that the hearing complied with Section 809, and that the record demonstrated that the hospital's action was supported by substantial evidence.

Petitioner appealed the Superior Court's decision to the California Court of Appeal. Under Section 1094.5, the Court of Appeal, like the Superior Court, reviews the hospital's hearing to determine whether it complied with Section 809 and whether the record demonstrates that the hospital's action was supported by substantial evidence. *Id.* The Court of Appeal also found that the hearing complied with Section 809, and that the record demonstrated that the hospital's action was supported by substantial evidence.

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[2] Although Respondent is a private entity, not an administrative agency, California statutory law provides for court review of a hospital's hearing process through a writ of administrative mandamus.

Petitioner filed for review in the California Supreme Court. The California Supreme Court denied Petitioner's petition.

ARGUMENT

IV. PETITIONER FAILS TO RAISE A FEDERAL QUESTION FOR REVIEW

Petitioner's assertion of jurisdiction in this matter fails because he does not raise any federal question for review. A private hospital's decision to terminate a physician's medical staff privileges and membership on the basis of his substandard clinical care and judgment does not raise any of the jurisdictional mandates set forth in 28 U.S.C. § 1257. This is apparent from a plain reading of 28 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1993).

Petitioner is appealing the state court's application of state law to a private hospital's peer review decision. No federal issue is raised; therefore, Petitioner's petition for certiorari should be denied.

A. The Due Process Clause Of The Constitution Is Inapplicable

Petitioner argues that the hearing process he received at the hospital violated federal Due Process rights, as described in Article XIV, Section 1 of the Constitution. It is axiomatic

that in order to establish a Due Process claim, a party must allege that his or her Constitutional rights were infringed upon as a result of "State Action." The Fourteenth Amendment's guarantee of Due Process applies to Petitioner's claim only if he can show that the Respondent's adverse actions against Petitioner's medical staff membership were tantamount to action by the State of California. *Blum v. Yaretsky*, 457 U.S. 991 (1982). Petitioner has not demonstrated any nexus between the private Respondent's action and the state that would justify attributing the Respondent's actions to the state. His references to the California and federal laws that require Respondent to report adverse privilege decisions to the government do not meet the standards for invoking Fourteenth Amendment protections.

This Court reiterated the rational for Constitutional State Action analysis in *Blum v. Yaretsky*:

> The Fourteenth Amendment . . . provides in part that '[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.' Since this Court's decision in the Civil Rights cases . . . 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' 'That amendment erects no shield against merely private conduct, however discriminatory or wrongful.' 457 U.S. 1002-03 (citations omitted).

In *Blum*, this Court held that private nursing homes' decisions to transfer patients without notice or an opportunity to be heard did not constitute State Action. *Id.* at 1012. In so holding, the Court rejected the Medicaid patients' claim that the actions constituted State Action because the State had mandated that the private nursing homes periodically assess what level of care the patients required and adjusted the amount of state payments for the services based upon the nursing homes' decisions. *Id.* at. 993-96.

The plaintiffs in *Blum* alleged that the nursing home procedures and the state process did not give them adequate notice of the nursing homes' decisions or of their right to an administrative hearing, in violation of their rights under the Due Process clause of the Fourteenth Amendment. *Id.* The Supreme Court found that the plaintiffs had failed to establish "State Action" in the nursing homes' decisions to transfer or discharge patients because "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. The Court noted, "'[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment.'" *Id.* at 1004 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)). The Court held that "[t]he complaining party must show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the action of the State itself.'" *Id.* (quoting *Jackson*, 419 U.S. at 351). The Court concluded that "[t]he purpose of this requirement is to assure that Constitutional standards are invoked only when it can be said that the State is *responsible for* the specific conduct of which the plaintiff complains." *Id.* at 1004 (emphasis in original).

Like that of the plaintiffs in *Blum*, Petitioner's claim of State Action must also fail. Petitioner has not sued California, but rather a private hospital. Petitioner does not, and cannot, allege that the State was directly or indirectly involved in any aspect of the decision to terminate Petitioner's staff privileges. Since the Supreme Court's decision in *Blum*, the United States Courts of Appeals overwhelmingly have held that a private hospital's termination of a physician's privileges does not constitute "State Action," even in cases where plaintiffs alleged that the hospital is subject to state regulations and rules or receives significant public funding. *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989)

(establishing that merely because a state statutory scheme allows hospitals to suspend, revoke, or restrict a physician's hospital staff privileges, a hospital's decision to suspend, revoke, or restrict privileges does not constitute "state action" under 42 U.S.C. § 1983); *Pariser v. Christian Health Care Sys., Inc.*, 816 F.2d 1248 (8th Cir. 1987) (holding that a private hospital's receipt of public funds and tax benefits; submission to pervasive regulation, and performance of a public function did not raise the hospital's suspension of a physician's admitting privileges to a state action); *Ezpeleta v. Sisters of Mercy Health Corp.* 800 F.2d 119 (7th Cir. 1986) (holding that the decision to terminate staff privileges at a private hospital cannot be fairly attributed to the state under the due process clause, even when made within the context of the statutorily mandated peer medical review process).

Carter v. Norfolk Cmty. Hosp. Assoc., 761 F.2d 970 (4th Cir. 1985) (finding that a private hospital's receipt of federal funds, submission to state regulations, and compliance with state encouragement to curb Medicare and Medicare abuses did not transform the hospital's action terminating a physician into state action under the due process clause); *Crowder v. J. K. Conlan*, 740 F.2d 447 (6th Cir. 1984) (finding that merely because a hospital receives considerable government funding, is subject to extensive state regulation, has two public officials serving on its board of trustees, and had been purchased by the county and then leased back to the board of trustees pursuant to a state statute, neither the state nor county was involved in the hospital's daily operation or retained coercive control over the hospital; therefore, the restriction of a physician's privileges did not involve state action under 42 U.S.C. § 1983); *Mendez v. Belton*, 739 F.2d 15 (1st Cir. 1984) (holding that being subject to extensive state regulation and receiving federal funds does not change a private hospital's decision regarding a physician's privileges into state action under 42 U.S.C. § 1983 and the due process clause); *Loh-Seng Yo, M.D. v. Cibola Gen. Hosp.*, 706 F.2d 306 (10th Cir.

1983) (holding that an adverse action against a physician's privileges by a private hospital that received Medicare and Medicaid payments and construction funding under federal law, submitted to extensive state and federal regulations, and maintained a localized geographic monopoly, did not give rise to state action where the plaintiff makes no allegation that the state was involved in any significant manner in the adverse action).

See also Hodge v. Paoli Mem'l Hosp., 576 F.2d 563 (3d Cir. 1978) (holding that private hospital's decision to terminate staff privileges did not constitute state action, despite hospital's receipt of federal funds and tax exemption, as well as begin subject to state licensing requirements). *But cf. Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992) (finding that where state law creates a property interest in hospital privileges, all physicians are entitled to due process in decisions affecting hospital decisions).

Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986) is typical of the appellate courts' reasoning in private hospital adverse action cases. In *Goss*, a physician whose medical staff privileges were suspended brought action against the hospital under 42 U.S.C. § 1983, claiming that the hospital's conduct denied him procedural Due Process. *Id.* at 354. The *Goss* plaintiff's theory was that the hospital acted under color of state law when it expelled him from the Medical Staff under the authority of the Texas Medical Practice Act. *Id.* at 356. This act, much like California law, required review of physicians' qualifications for staff privileges and authorized a medical peer review committee to report its findings to the Texas State Board of Medical Examiners. It also provided immunity from liability for peer review committee members, as does California law. *See Cal. Civil Code* §§ 43.7, 43.8. (West 1990 Supp. 2005).

The United States Court of Appeals for the Fifth Circuit held that the hospital's peer review actions did not constitute

State Action. In order to be considered State Action, the court held that there would have to exist a "nexus" between the acts of the peer review committee members and the state "such that appellees' conduct is "fairly attributable to the state."" *Goss*, 789 F.2d at 356 (quoting *Rendell-Baker v. Cohn*, 457 U.S. 830, 838 (1982)). In order to be so attributable, the state must have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Id.* (quoting *Rendell-Baker*, 457 U.S. at 840 (citations omitted)).

The actions of Respondent herein likewise are not "fairly attributable to the state," nor is there any exercise of "coercive power" or "significant encouragement" sufficient to qualify Respondent's actions against Petitioner as State Action. *Id.* Respondent, not the state, terminated Petitioner's medical staff membership and provided him with an internal, private hearing. Petitioner's citation to the requirement that Respondent report adverse actions to the California Medical Board and the NPDB does not transform the Respondent's action into state action. *See Goss v. Mem'l Hosp. Sys.*, 789 F.2d 353 (5th Cir. 1986). In *Blum*, plaintiffs argued that the private nursing home's decisions to transfer patients to a different level of care involved state action because state authorities "responded" to the challenged transfers by adjusting the patients' Medicaid benefits. *Blum*, 457 U.S. at 820. This Court held that:

> our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiative of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the

Fourteenth Amendment. *Id.* at 1004-05 (emphasis added) (citations omitted).

Like the state agencies in *Blum* responsible for Medicaid administration, California physician licensing authorities *respond* to the action of the private entity, the hospital. State and federal law requires hospitals to make reports of actions *already taken*. It does not dictate the actions themselves. Petitioner is neither challenging the state and federal reporting statutes, nor asserting that any of the respondents violated the reporting statutes in this instance. Instead, he objects only to Respondent's decision that led to its statutory obligation to report. Thus, as in *Blum*, the fact that the state responds to the hospital's adverse actions by requiring it to report those actions does not make the state responsible for the hospital's decision.

Because Petitioner makes no challenge to California or federal law, and never alleges state action, his Due Process claim must fail.

B. No Federal Statute Is At Issue

Petitioner briefly cites the Federal Health Care Quality Improvement Act ("HCQIA"), codified at 42 U.S.C. § 11101, to argue that federal law elucidates physicians' rights and requires "impartial adjudicators and fair procedure in accordance with due process for hearings regarding the revocation of hospital privileges." (Petition for Certiorari, p. 7.) Contrary to Petitioner's statement, HCQIA does not grant federal hearing rights to physicians, but rather provides immunity to hospitals who perform appropriate peer review. Consequently, Petitioner fails to raise a federal question through his citation to HCQIA.

According to the Congressional findings detailed in 42 U.S.C. § 11101, HCQIA was enacted to provide incentives and protections for individuals and entities participating in peer review. Under 42 U.S.C. § 11111 and § 11112, if a pro-

fessional review body (for example, a hospital medical staff), complies with the peer review process outlined in § 11112, then the professional review body is immune from all federal liability (except for certain civil rights violations) that might arise from the peer review action. Section 11111(a) provides:

> If a professional review action . . . of a professional review body meets all the standards specified in section 11112(a) of this title . . .
>
> (A) the professional review body, ...
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

HCQIA does not require hospitals to provide a process that complies with § 11112; nor does HCQIA guarantee physicians the hearing procedures outlined in § 11112. The processes are purely optional—if the hospital does not desire to have the federal immunity the statute provides, it can ignore all of the processes outlined in § 11112.

The argument that HCQIA confers hearing rights to physicians has been soundly rejected by the three federal circuits which have addressed the question. In *Wayne v. Genesis Medical Center*, the Eighth Circuit Court of Appeals held that HCQIA's express language makes clear that no cause of action exists for physicians who claim that a hospital failed to follow HCQIA's peer review process. 140 F.3d 1145, 1147-48 (8th Cir. 1998). The Tenth Circuit in *Hancock v. Blue Cross-Blue Shield, Inc.*, 21 F.3d 373 (10th Cir. 1994) and the Eleventh Circuit in *Bok v. Mutual Assurance, Inc.* 119 F.3d 927 (11th Cir. 1997), made similar findings.

In his Petition, Petitioner does not challenge the validity of HCQIA, nor does he challenge California law in relation to HCQIA. Instead, he makes an empty claim that HCQIA grants him federal rights. The plain meaning of the statute and federal case law establish that Petitioner's claim is meritless.

C. The Cases Petitioner Cites Regarding Judicial Bias Are Inapplicable

Petitioner cites numerous inapposite cases in his argument that the arbitrator at the private hospital hearing was presumed to be biased because Respondent paid the arbitrator's fee. Each of the federal cases Petitioner cites involves some sort of government entity or fact-finder—whether it be a judge, mayor, or agency—that had a pecuniary interest in the outcome of the matter.[3] The holdings in these cases depend on a combination of the state action (thus raising Due Process claims) and the actual pecuniary interest of the judge, mayor, or agency in the outcome of the matter. In contrast, the present matter does not involve state action (and therefore does not raise a Due Process claim), and the arbitrator received no pecuniary interest dependent on the outcome of the matter.[4]

Petitioner's citations therefore are inapposite. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the mayor who adjudicated a criminal case received fees and costs only if the defendant was convicted. The Supreme Court found a system that incentivized the mayor to convict defendants to violate Due Process. *Id.* at 532. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the mayor was responsible for village finances, and also maintained judicial power. Although the mayor was not paid directly for convictions, the village that he financially administered directly benefited from the imposition of fines from criminal convictions. The Supreme Court found this to be a conflict violating the defendant's Due Process rights. *Id.* at 57-60. In *Brown v. Vance*, the Fifth Circuit Court of Appeals found that in a system where a judge's compensation depended on the number of cases filed

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[3] Respondent will address the state cases Petitioner cites in Section V below.

[4] The arbitrator was paid for the services provided, independent of outcome.

in his or her court, judges would be encouraged to convict defendants or rule in favor of civil plaintiffs in order to garner favor with the police and civil attorneys who unilaterally determined with which judge they would file their cases. 637 F.2d 272, 285-86 (5th Cir. 1981). That system thus violated both criminal and civil defendants' Due Process rights. *Id.* at 283-85.

In *Gibson v. Barryhill*, 411 U.S. 564 (1973), the Alabama Board of Optometry—a state agency—consisted of members in direct financial competition with optometrists charged with unprofessional conduct. The Board also was litigating a matter against those optometrists and their employer. This Court upheld the District Court's finding that because the Board was composed solely of practitioners in competition with the charged optometrists, the Board members' pecuniary interest disqualified them. *Id.* at 578-79. In *Aetna Life Insurance Company v. Lavoie*, an Alabama Supreme Court judge cast the deciding vote in a case whose outcome could directly affect a similar lawsuit in which he was a plaintiff. 475 U.S. 813, 821-25 (1986). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), a judge ruled in a case that would financially benefit a hospital on whose board he sat. Finally, in *Withrow v. Larkin*, 421 U.S. 35 (1975) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court ruled that certain *state action* (in *Withrow*, action by the Wisconsin Medical Examining Board, and in *Goldberg*, action by welfare board) required due process. The Court made no ruling regarding bias of the fact finder in those cases.

None of these cases cited by Petitioner are relevant here. First, no state action is alleged by Petitioner—the action was taken by a private entity after a hearing in front of a private arbitrator. Therefore, cases that address Due Process are inapplicable. Second, the compensation for the mutually selected arbitrator did not depend on the outcome of the

hearing. Once again, Petitioner fails to raise a legitimate federal question.

V. THE STATE COURTS' DECISIONS ARE CONSISTENT WITH STATE LAW

Petitioner argues that the state courts' decisions that address the selection of the arbitrator for the medical staff hearing conflict with California case law. Because a state court's application of state case law to a private entity does not raise a federal issue, it is not appropriate for Supreme Court review.

Moreover, Petitioner's analysis of the courts' application of state case law is erroneous. Petitioner's discussion is based on the fallacy that Respondent "chose" the hearing officer. The record below is clear that, as required by state law, the MEC and Petitioner selected the arbitrator by a process "mutually acceptable to both parties." Cal. Bus. & Prof. Code § 809.2(a) (West 2003). The evidence from the administrative record presented to the California Superior Court and the California Court of Appeal establishes that the arbitrator was appointed only after both parties participated in voir dire and neither party objected to his appointment. Petitioner cannot truthfully deny this fact.

Petitioner's analysis of *Haas v. County of San Bernardino* 27 Cal. 4th 1017 (2002) and *Yaqub v. Salinas Valley Memorial Healthcare System* 122 Cal. App. 4th 474 (2004) is therefore inapposite. In *Haas*, San Bernardino County, a state actor, unilaterally selected a hearing officer over Mr. Haas's objections.[5] *Haas*, 27 Cal. 4th at 1021. In its opinion, the

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[5] Petitioner failed to cite *Haas* in his briefs to the California Court of Appeal. He provides no explanation as to why he decided not to cite this case, which the California Supreme Court decided in 2002, to the lower court. Moreover, in his Court of Appeal brief, Petitioner did not fully brief his argument regarding alleged arbitrator bias, spending less than 50 words on the argument and failing to cite any of the federal cases dis-

California Supreme Court emphasized that the County's unilateral and at-will selection of hearing officers raised a concern regarding the appearance of bias. *Id.* The County also paid the hearing officer's fee in its entirety, which compounded the selection concern. *Id.* The Court specifically noted that *even if the fee had been split, the unilateral selection by the County was a significant enough concern to raise the appearance of bias.* *Id.* at 1030-31. In other words, unilateral selection, not payment, was the deciding factor in the decision.

As in *Haas*, the California Court of Appeal in *Yaqub* decried the hospital's unilateral appointment of a hearing officer as violating California's laws regarding hospital peer review actions.[6] *Yaqub*, 122 Cal. App. 4th, at 485-86. As a secondary matter, the Court also observed that the hospital paid the hearing officer's fee. *Id.* at 484. Notably, like Mr. Haas, Dr. Yaqub objected to the appointment of the hearing officer at the outset of the hearing. *Id.* at 481.

The facts in the instant matter are significantly different from *Haas* and *Yaqub*. In direct contrast to those cases, Respondent did not unilaterally select the arbitrator—Respondent and Petitioner mutually agreed to the arbitrator after voir dire. Further, Petitioner *never objected to the selection of the arbitrator, or that Respondent paid the*

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cussed in Section IV.C above. Respondents therefore respectfully request that this issue be considered waived.

[6] *Yaqub* became final after the Court of Appeal denied Petitioner's writ of mandate petition on December 1, 2004. *Yaqub* was decided on September 16, 2004, and appealed to the California Supreme Court on October 26, 2004. The California Supreme Court denied review on January 12, 2005. Pursuant to California Rules of Court Rule 29.4, the Court of Appeals decision in *Yaqub* did not become final until the California Supreme Court denied review. Therefore, under California law, Petitioner could not rely on *Yaqub* in his argument before the Court of Appeal, and the Court of Appeal appropriately did not consider that case.

arbitrator's fee, until after he had lost the arbitration. Had Petitioner truly believed that the selection and payment was procedurally unfair, he should have voiced his concerns before the conclusion of an arbitration that took over two and half years and 32 sessions to complete. His failure to do so should result in his argument being waived.

Respondents know of no California law that prohibits a private party from paying a *mutually* selected arbitrator when the other party never objects or offers to share the payment. Because the fundamental facts in this matter are significantly different from those in the *Haas* and *Yaqub* decisions, the California Court of Appeal applied state law correctly and rejected Petitioner's arguments.

CONCLUSION

On the basis of the foregoing, Respondents respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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The two other California cases Petitioner cites also are irrelevant. *Hurtado v. Statewide Home Loan Comp.*, 167 Cal. App. 3d 1019 (1985) does not address the selection of judges or arbitrators at all. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951 (1997) discusses the manner in which a medical group applied a private arbitration agreement in a medical malpractice case, and does not address the selection of arbitrators in peer review cases.

Supreme Court, U.S.
FILED
AUG - 8 2005
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No. 04-1536

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner in Pro Se

QUESTION PRESENTED FOR REVIEW

May state courts allow the use of adjudicators who have a direct, personal, substantial, pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States, that guarantees due process and fair procedure?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

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INTRODUCTION

The single issue brought before this court is whether state courts may allow the use of adjudicators who have a direct, personal, substantial, and pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States that guarantees due process and fair procedure? Respondents' Brief in Opposition to Petitioner's Writ of Certiorari (page i) asks three different questions, all of which confuse rather than clarify the issue Petitioner brings before this court.

Petitioner asks whether the Due Process clause of the United States Constitution bars State laws that permit overtly biased adjudicators to rule in matters affecting the deprivation of a property right.

STATE COURTS' STANDARD OF REVIEW

Respondents (pages 7-8) omit that Cal. Code Civ. Proc. § 1094.5(b) requires the courts to also review questions of *fair procedure.*

JURISDICTION

I. The U.S. Supreme Court Has Jurisdiction Where State Law as Applied Violates Foundational Principles of the United States Constitution.

(a) Peer Review is a State Action.

Respondents argue that the hearing they afforded Petitioner did not violate the due process clause of the Fourteenth Amendment because Petitioner's rights were not infringed upon as the result of a "state action". Respondents (pages 8-14) cite inapplicable cases in an effort to deny the obvious fact that physician peer review and peer review hearings are the result of state action. Notably, every case Respondents cite *predates* 1989.

In 1989 the State of California designed a peer review system of its own, setting forth a detailed regulatory scheme governing peer review activity, and thereby *delegated the state's responsibility for peer review* to the private sector. ". . . to *aid the state licensing boards* in *their responsibility* to regulate and discipline errant healing arts practitioners. . . it is the policy of the State of California through the *peer review system as provided for by California law. . .*" Cal. Bus. & Prof. Code § 809(a)(5) and (6)[1]. (Emphasis added).

State statutes (*809, et seq.*) dictate the time, place and manner of any peer review Hearing. State law explicitly requires that any such Hearing comport with the minimum standards of due process and fair procedure. State law requires physicians to seek review of adverse peer review decisions in state courts. These factors establish that the actions of the hospital are the actions of the state.

The threshold inquiry in any case involving a private entity accused of violating a person's constitutional rights under the Fourteenth Amendment is whether that private entity may be regarded as a state actor.

Lugar v. Edmonson Oil Co., 457 U.S. 922 [102 S.Ct. at 2753-54] states the criteria for state action as:

> "First, the deprivation must be caused by the exercise of some right or privilege *created by the State* or by a rule of conduct *imposed by the state* or by *a person for whom the State is responsible*. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a *state actor*. This may be because he is a state official, *because he has acted together with* or has obtained significant aid from state officials, or because his conduct is *otherwise chargeable to the state*." (Emphasis added.)

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[1] Cal. Bus. & Prof. Code § 809, is hereafter referred to as *809, et seq.*

These criteria are present in Petitioner's case, as shown above.

The dispositive question in any state-action case is not whether *any single fact* or relationship presents a sufficient degree of state involvement, but rather whether the *aggregate of all relevant factors* compels a finding of state responsibility. (*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)).

Respondents cite *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 350 (1974), in which the court found no state action on the part of an electric utility company that denied services without due process. The facts are inapplicable to the instant matter. But the principle was directly addressed by Justice Marshall in his dissent:

> "*But* when the activity in question is of such public importance that the *State* invariably either provides the service itself *or permits private companies to act as state surrogates in providing it*, much more is involved than just a matter of public interest. In those cases, the State has determined that *if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body*. And when the *State's regulatory scheme has gone that far*, it seems entirely consistent to impose on the public utility the *constitutional burdens normally reserved for the State*." (Emphasis added.) *Jackson, supra*, 419 U.S. 345 372 (Justice Marshall, dissenting) (1974).

The criteria Justice Marshall identifies as indicating state action are indeed present in the instant case. The State delegated its responsibility for peer review to the private sector and required strict adherence to the state's regulatory scheme (*809, et seq.*) Likewise, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the court found the existence of state action in circumstances where "the State has sufficiently

insinuated itself into a position of *interdependence* with [the company] that it must be recognized as a joint participant in the challenged activity."

Respondents (page 11) misquoted *Ezpeleta v. Sisters of Mercy Health Corp.* 800 F.2d 119 (7th Cir. 1986). Respondents claim the court held, "the decision to terminate staff privileges at a private hospital cannot be fairly attributed to the state under the due process clause, even when made within the context of the statutorily-mandated peer medical review." Respondents omit that the court went on to state "...*Unless* the regulation *includes specific criteria for guidelines as to what action must be taken and when.*" *Ezpeleta, supra,* 800 F.2d 119 (7th Cir. 1986) (emphasis added). In the instant case, the state's regulation (*809, et seq.*) does include specific regulatory guidelines as to what action must be taken and when. Therefore, according to all the above-stated case law, state action is present in this case.

(b) Hospital Privileges are a Property Right.

By affirming a hospital's improper adjudication, the highest court of the state has denied Petitioner his right to the due process required under the U.S. Constitution. *See, e.g., Lowe v. Scott,* 959 F.2d 323 (1st. Cir. 1992) (where *state law creates a property interest in hospital privileges,* all physicians are *entitled to due process in decisions affecting hospital decisions*). *See also Lowe, supra* at 323 stating, "when a public hospital grants a physician hospital privileges, and *undertakes explicitly or implicitly not to revoke these privileges without appropriate process, a protected property interest is created.*" "The *already-licensed,* have a vested property interest in the license, which forecloses denial without due process." *Lowe, supra* at 323. (Emphasis added.) *See also Board of Regents v. Roth,* 408 U.S. 564 (1972).

Supreme Court precedent holds that property and liberty interests require the due process rights under the Constitution. In *Board of Regents, supra* a professor *without tenure* was not

rehired at the end of his one-year contract. The Court held that the particular interest at hand was neither a property nor liberty interest because of the lack of tenure. In Petitioner's case, there is a clear property interest insofar as Petitioner was already licensed and tenured, and both the State (through *809, et seq.*) and Respondents' Hospital Bylaws explicitly preclude revocation of Hospital privileges without due process. Petitioner also had a liberty interest insofar as Respondent's actions seriously damaged his professional reputation and compromised his *future* employment prospects because of the required reporting to state and federal data banks and the required disclosure on all future hospital and staff employment applications. Thus, Petitioner has raised recognized federal questions for review.

II. A Federal Statute is at Issue.

Respondents (pages 14-15) state, "Petitioner has cited no *federal statute* to argue that federal law elucidates physicians' rights and requires "impartial adjudicators and fair procedure in accordance with due process for hearings regarding termination of hospital privileges." Respondents have overlooked Petitioner's Writ, p. 3:

"The rights of physicians are elucidated in federal law, as in *42 U.S.C. § 11112, et seq*. Such protections comport with numerous Supreme Court decisional precedents, which require a fair hearing with the rudiments of due process whenever individuals face loss of a substantial right. *Mathews v. Eldrige* 724 U.S. 319 (1976); see *also Goldberg v. Kelly*, 397 U.S. 254, 267 (administrative hearings demand rudimentary due process, and an 'impartial decisionmaker is essential.')" (Emphasis added.)

Respondents (page 15) claim, "the provisions of 42 U.S.C. § 11112 are purely *optional*", that "if a hospital does not *desire federal immunity,* the statute provides it can *ignore* all of the processes outlined in § 11112." This is false. First, Section 11112(b) gives *only the physician* the right to waive the fair hearing requirements; second, the statute's plain meaning is that (1) fair procedure be afforded; and (2) that hospitals be granted

immunity if they follow fair procedure. For any hospital to interpret the statute as meaning that it can deliberately ignore the fair hearing requirements of § 11112 if it does not *desire federal immunity*, is an extremely bad faith *misinterpretation* of the statute. The U.S. Constitution does not grant the option to ignore due process, nor does the U.S. Supreme Court. "Speaking of administrative hearings, and articulating the procedural requirements '*demanded by rudimentary due process*' in that setting, the [United States Supreme Court] has said that, 'of course, an impartial decision maker is essential.'" (*Haas v. County of San Bernardino*, 27 Cal.4th at 1025, quoting *Goldberg, supra.*")

III. The Cases Petitioner Cited Regarding Presumed Bias of Adjudicator with a Pecuniary Interest are Directly Applicable.

Respondents claim the cases presented by Petitioner are not on point because the holdings depend on a *combination of state action* and that the pecuniary interest received must be dependent on the "*outcome*" of the matter. This analysis is incorrect.

The high court has repeatedly and unambiguously held that courts, when faced with a claim of bias arising from financial interest, do *not* require proof of a direct pecuniary interest in the "*outcome*" of a particular case, or proof of *actual* judicial prejudice, nor do they decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 [93 S.Ct. 80, 83]), namely whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' (Emphasis added.) *See also Aetna, supra,* 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587] and *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444].

The rule disqualifying adjudicators with pecuniary interests applies with full force to administrative hearings. In this context, the court has applied the same rules to *administrative hearing officers and judges alike*. *Gibson v. Berryhill*, *supra*, 411 U.S. at p. 579 [93 S.Ct. at p. 1698].) The high court has written: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." (*Gibson, supra*, 411 U.S. 564, 57. An adjudicator with a financial interest in a proceeding presents a "situation[] . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35 (1975).

The high court requires disqualification of adjudicators only for financial interests that it has characterized as "direct, personal, substantial, [and] pecuniary" rather than "slight." (*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, quoting *Ward, supra*, 409 U.S. 57, 60 and *Tumey, supra*, 273 U.S. 510, 523.)

IV. Federal Law and U.S. Supreme Court Precedent Conflict With the State Courts' Decisions in this Case.

The California Superior Court and Appellate Court held that Petitioner must prove *"actual"* bias and pecuniary interest based on the *"outcome"* of the hearing in order to prevail on an allegation of financial interest in violation of due process. However, this holding, as shown above, is in direct conflict with the above-cited U.S. Supreme Court precedent cases.

Furthermore, this holding is in direct conflict with the Sixth District California Court of Appeal's recent holding in *Yaqub v. Valley Memorial Healthcare System*, 122 Cal.App.4th at 485 (2004). *Yaqub* [2], applying the principals of *Tumey, Ward* and

[2] Contrary to Respondents' claim that the *Appellate Court* properly ignored *Yaqub* because *Yaqub* was not final until the California Supreme Court denied review, it should be noted that *Yaqub* cited and relied on principals from well-established law, *Haas, Tumey* and *Ward*, all of